



Lack of Quorum Costs East Kentucky Power Cooperative in PURPA Dispute

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The Public Utility Regulatory Policies Act of 1978 (PURPA), a 1970s law that sought to foster the development of independent power producers and renewable generation, requires electric utilities to buy power at “avoided cost” from QFs.¹ Pursuant to FERC’s Order No. 688, however, utilities may seek authorization from FERC to terminate this purchase requirement prospectively for QFs that have nondiscriminatory access to a wholesale electricity and capacity market. Importantly, any such termination does not apply to “legally enforceable obligations” between a QF and the utility that exist **prior to the filing** of the utility’s application seeking termination of the purchase requirement.

On November 4, 2016, EKPC submitted its initial application seeking to terminate the purchase requirement in its service territory for QFs of more than 20 MW. PURPA and FERC’s regulations require the Commission to make a final determination within 90 days of the application’s filing date. Due to the lack of quorum at the Commission, however, the Commission was unable to act on the filing within 90 days. FERC issued a notice in March 2017 noting as much and deemed the application denied. EKPC resubmitted the application in March, but FERC, still lacking a quorum, deemed the application denied once again in June when the 90-day period expired. EKPC filed a third and final application in June 2017, which FERC approved in the September 2017 Order.

While FERC granted EKPC’s June 2017 application, it held that termination of the purchase requirement was effective June 9, 2017—the date of the third and final application—and not the date of EKPC’s initial application, November 4, 2016, as EKPC requested. Bluebird Solar LLC and Blue Jay Solar LLC, two QFs in EKPC’s territory, informed EKPC of their intention to sell

their output to EKPC pursuant to PURPA prior to June 9. FERC therefore concluded that EKPC's application "does not foreclose Bluebird or Blue Jay from having established a legally enforceable obligation under PURPA."¹ Barring any state law restrictions, FERC concluded that Bluebird and Blue Jay "would be grandfathered such that Commission approval of [the] Application would not include Bluebird or Blue Jay QFs."² Had the Commission approved the original (and nearly identical) EKPC application from November 2016, the two QFs would not have received grandfathered status because the original application preceded the QFs' legally enforceable obligations.

The 90-day requirement in the PURPA statute states that FERC "shall make a determination" on any such application within 90 days, but it does not state—in contrast to certain provisions in the Federal Power Act—that inaction within that period automatically results in denial (or approval). EKPC sought rehearing of FERC's notice deeming the application denied, but the Commission dismissed the request because, according to FERC, the notice does not constitute a final Commission order subject to rehearing.

In other PURPA news, FERC issued an order granting QF certification last week to the Beaver Creek Wind II, LLC and Beaver Creek Wind III, LLC facilities located in Stillwater County, Montana. The utility required to purchase the output of the QFs, NorthWestern Corp., had protested the application, arguing that the facilities are each within one mile of other affiliated Beaver Creek Wind projects and that, based on the Commission's "one-mile rule," the facilities exceed the 80 MW limit for QF status.⁴ While this proceeding appeared to provide FERC with an opportunity to clarify its methodology for applying the one-mile rule, FERC ultimately declined to provide clarification because it found that Beaver Creek II and Beaver Creek III are neither affiliates of each other nor the other Beaver Creek projects located in close proximity.

¹ QFs are small, renewable generation facilities and cogeneration facilities.

² September 2017 Order at P 21.

³ *Id.*

⁴ To determine whether two or more facilities are located at the same site, FERC's regulations specify that a facility located within one mile of the facility for which QF status is sought—as measured by the distance between the electric generating equipment of the facilities—is deemed to be located at the same site. 18 C.F.R. § 292.204(a)(2). Thus, two 80 MW facilities owned by affiliates would not qualify as separate QFs if they are located within one mile of each other.

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